

Thomas Drummond of Logie Almond, Esq; - - - - - Appellant.

His Majesty's Advocate for *Scotland*, on Behalf of his Majesty, - - - Respondent.

The Respondent's C A S E.



Y the Act of Attainder of the 19th of the King, of certain Persons therein mentioned who were engaged in the late unnatural Rebellion, it is enacted, That if they should not respectively surrender themselves to Justice on or before the 12th Day of *July* 1746, they should stand and be attainted of High Treason from and after the 18th of *April* 1746, and in this Act, among others, were comprehended *James Drummond*, taking to himself the Title of Duke of *Perth*, and *John Drummond*, who went by the Name of Lord *John Drummond*, only Brother of the said *James*.

By the Vesting Act of the 20th of the King, all Lands and Heretages of which any Person attainted of High Treason for the late Rebellion, within the Time therein limited, was seized, or possessed of, or interested in, on the 24th Day of *June* 1745, or at any Time afterwards, shall stand and be forfeited to, and vested in his Majesty.

In Pursuance of the Directions of the said Vesting Act, the Barons of the Exchequer in *Scotland* caused the Lands and Lordship of *Drummond* and *Perth*, being the Estates of which the said *James Drummond* was seised in Fee, to be surveyed for the Use of his Majesty.

To this Survey the now Appellant excepted, by entering his Claim in the Court of Session to the said Lands, in Virtue of a Deed of a Disposition in Trust, of Date the 16th of *June* 1743, by the said *James Drummond*, of the said Lands, to the Appellant.

To this Claim, Answers were made on Behalf of his Majesty by the Respondent, who having insisted, as by a Clause in the said Vesting Act he was intitled to do, that the Claimant should appear and answer upon Oath to certain Interrogatories relating to the History of that Deed of Disposition under which he claimed, the Appellant accordingly appeared in Court and deposed as follows:

"That he never saw the principal Disposition upon which his Claim to the Estate of *Drummond* is founded, but that he has seen a Copy of it, which Copy was sent him by Lady *Mary Drummond* in Summer 1747, as he thinks, without any Letter along with it, only a Verbal Message to let him know that such a Deed was granted in his Name."

"That the Disposer told him, as he thinks in the Year 1745, that he intended to grant, or had granted, such a Disposition for the Advantage of his Family and Creditors."

"That he the Deponent paid no Money or valuable Consideration for the Disposition, and that he knew nothing about the executing of the Disposition at the Time it was executed, but was told, he thinks by Mr. *James Graham*, Advocate, deceased, that there was such a Disposition in his Name; but Mr. *Graham* did not tell him where the Disposition lay."

"That it was proposed to the Deponent that an Exhibition should be raised in his Name of the Disposition, which he agreed to, but who it was that proposed it to him, he cannot remember."

In the farther Procedure upon that Claim the Appellant brought Proof, to the Satisfaction of the Court of Session, that the said *James Drummond* died upon the 11th of *May* 1746, in his Voyage to *France*, on board a *French* Vessel, in which he found Means to escape after the Battle of *Culloden*, whereupon the Court of Session pronounced the following Judgment.

Having heard the Claim of *Thomas Drummond of Logie Almond*, to the Estate of *Perth*, with the Answers and Defences for his Majesty's Advocate, and heard Parties Procurators thereupon, FIND, that *James Drummond*—taking upon himself the Title of Duke of *Perth*, having died upon the 11th of *May* 1746, before the 12th of *July* 1746, on or before which Day he was allowed by the said Act of Attainder to render himself and submit to Justice, he the said *James Drummond* was not attainted by the said Act, and therefore FIND, that this Court has no Jurisdiction to proceed further in judging of the Validity or Effect of the Disposition from the said *James Drummond* to *Thomas Drummond* the Claimant in *hoc Statu*, leaving the Claimant to follow forth his Right thereupon as accords.

This Judgment became final, the Respondent having been advised to acquiesce therein, and that the rather because upon the Death of the said *James Drummond* upon the 11th of *May* 1746, without Issue, the Lands in Question, by the Investiture thereof, devolved upon *John Drummond* his only Brother, who being also comprehended in the same Act of Attainder, and having survived the 12th Day of *July* 1746, without having rendered himself to Justice, became then effectually attainted of High Treason.

And accordingly the Barons of *Exchequer* in *Scotland* caused the said Estate to be re-surveyed as forfeited to his Majesty by the Attainder of the said *John Drummond*, whereupon the Appellant presented a new Claim to the Estate founded, as the former had been, on the Disposition made by *James Drummond*, of Date 16 *June* 1743, alledging, that the said *John Drummond* was not seised, or possessed of, or interested in, or entitled into the foresaid Lands and Estate on the 24th of *June* 1745, or at any Time since, but that the Claimant had Right thereto by Virtue of the said Disposition.

To this Claim Answers were made by the now Respondent, setting forth, the History of the Deed or Disposition itself in Part given by the Appellant upon Oath in the Words above recited, and farther in Point of Fact observing,

That it was now notorious, from the Facts that came out in the late Lord *Loval's* Tryal, and which if needful, could be again proved in this Cause, That *James Drummond*, the Maker of this Deed of Disposition, and *John Drummond* the attainted Person, his Brother and presumptive Heir, were as early, at least, as the beginning of the Year 1742, engaged in a Conspiracy for overturning the present happy Establishment of this Kingdom, by the Aid of a foreign Force. And that they were two Persons of seven who signed a Memorial that was sent to *Paris*, with *Drummond of Bochalzie*, to promote that Purpose, as is mentioned by a Witness in the said Tryal, Page 74; and the same Witness, Page 76, relates, That in the Spring of the Year 1743, he himself, after being at *Paris* on the same Errand, returned by *London* to *Edinburgh*, and by the Way stopped at *York*, where he met with the late Lord *Perth*, who was then at *York*, and acquainted him with what had been done at the Court of *France* for the Service of the Pretender, in Pursuance of the Application made to that Court about a Year before, contained in the Memorial, signed by Lord *Perth* himself, and his Brother, and five others.

It was upon the 16th of *June* 1743, that is, about two Months after this Interview at *York*, that the Disposition now claimed under was signed by *James Drummond*, at his House of *Drummond Castle*, after he had returned from *York*, and taken such Advice as he thought fit to have Recourse to, about the Method of setting his House in Order, that was thought expedient in the then Circumstances of himself and his Brother; and that the Result of these Councils was, the Deed upon which the Appellant's Claim is founded, of which the Contents, and most remarkable Clauses, are as follows:

" Be it known to all Men by these Presents, me *James Drummond* of *Perth*, Esq; commonly called Duke of *Perth*, heretable Proprietor of the Lands and others after-mentioned: Forasmuch as I considering, that I am frequently very sickly and tender in my Constitution, and having some Thoughts of retiring from the World, the better to prepare for a future State; and also considering that *John Drummond*, Esq; commonly called Lord *John Drummond*, my only Brother-German, and now Captain in the Regiment of *Roth*, in *France*, is Abroad in the Army, and in a foreign Service, whereby his being married, or his Capacity of succeeding me in my Estate, may be very dubious and uncertain; and that I am resting and owing to several Persons very considerable Sums of Money that ought in Justice and Equity to be paid; therefore, and for other weighty Motives and Considerations, will ye me to have given and granted, &c.

" The Deed then proceeds to dispoise the Estate to the now Claimant *Thomas Drummond*, of *Logie Almond*, and his Heirs or Assigns whatsoever heretably, but redeemable always in Manner underwritten, and in Trust for the Uses, Ends, and Purposes after expressed." And after a long Enumeration of Lands, first in the dispositive Clause, and then in the Procuratory of Resignation, these Uses and Purposes come to be expressed in the Procuratory, Page 97, and downwards, in the Words following: " That this present Right and Disposition is granted to the said *Thomas Drummond*, of *Logie Almond*, and his Forefairs, in Trust for the Use and Behoof, Security and more sure Payment of all my just and lawful Debts, both real and personal, which are or may be owing by me and my Predecessors, and to which in Law I may be made anyways liable—and saving and reserving to *Jean Dutcheff* of *Perth* my Mother, her Life-Rent Rights, or Annuities, upliftable out of the said Lands, or any Part thereof."

" And also providing and declaring, That the said *Thomas Drummond* Trustee foresaid, and his Heirs, shall be bound and obliged to pay to me out of the Rents and Profits of the said Lands, during my Life-time, an yearly Free Annuity of 200 *l. Sterling* at two Terms, beginning the first Term's Payment thereof at the Term of *Whitsunday* next to come, for the Half Year immediately preceeding, and so forth yearly and termly thereafter, during all my Life."

" And after my Decease, the said yearly Free Annuity of 200 *l. Sterling* to be paid to the said *John Drummond*, Esq; commonly called Lord *John Drummond* my Brother-German, if he shall happen to survive me at the said two Terms in the Year, during his Life."

" And such-like providing and declaring, that the Remainder of the said Estate, after Payment of the Debts and Annuities as aforesaid, is expressly conveyed to the said *Thomas Drummond* and his Forefairs in Trust, for the Use and Behoof of Lord *John Drummond* my Uncle, and the Heirs Male or Female of his Body; which failing, to Mrs. *Mary Drummond* my Sister-German, commonly called Lady *Mary Drummond*, and the Heirs Male or Female of her Body; which failing, to the said *Thomas Drummond* of *Logie Almond* himself, and the Heirs Male or Female of his Body; which failing, to his Heirs and Assigns whatsoever in Fee."

" But redeemable always and under Reversion in Manner underwritten; and providing and declaring, that in Case I shall at any Time hereafter alter my Resolution, and enter into a married State, then and in that Case, the said *Thomas Drummond* of *Logie Almond*, Trustee above-written, and his Forefairs, shall be bound and obliged, as they by their Acceptation bind and oblige themselves to make due and thankful Payment of an yearly Free Annuity of 10,000 Merks, Scots Money (or 555 *l. 11 s. 2³ Sterling*) to such Wife as I shall happen to marry, or at least of so much thereof as shall be free out of the said Lands and Estate, after Payment of the Debts and Annuities above-written, and the other necessary Expences of the Trust, and that at two Terms in the Year, *Whitsunday* and *Martinmas*, by equal Portions, beginning the first Term's Payment thereof at the first Term of *Whitsunday* or *Martinmas* after her being so married to me, and so forth yearly and termly thereafter, during all the Days of her Life-time, and that to herself alone exclusive of my *Jus Mariti*, or any other Right or Title therein; and declaring, that the Receipts and Discharges thereof to be granted by her alone, without my Advice or Consent had or obtained thereto, shall be good and effectual to the said Trustee, and his Forefairs, to all Intents and Purposes."

" And also providing and declaring, that the said Lands, Lordships, Baronies, Earldoms, Jurisdictions, and others aforesaid, and free Remainder thereof, after Payment of the Debts and Burdens as before appointed, are and shall be redeemable from the said *Thomas Drummond* of *Logie Almond* and his Forefairs, and from the said Lord *John Drummond* my Uncle, and from the said Lady *Mary Drummond* my Sister and their Forefairs, by the Heirs Male or Female to be procreate of my Body, in Case I should happen to marry, and that upon the first Term of *Whitsunday* or *Martinmas* after such Heir of my Body shall attain the Age of Fourteen Years compleat, or any other Term of *Whitsunday* or *Martinmas* thereafter, and that upon Consignation of the Sum of 200 *l. Sterling* Money, betwixt the Hours of Three and Four in the Afternoon of any of the said Term Days, and that upon Premonition of 40 Days of before, to be made by them to the said *Thomas Drummond* of *Logie Almond* and his Forefairs personally, or at their Dwelling-place, if within *Scotland*, and if forth thereof, at the Market Cross of *Edinburgh*, Pier and Shore of *Leith*, upon 60 Days Premonition, in Presence of a Notary and Witnesses as Effectors, and that the Place of Redemption be within the new Session-house or Parliament-house of *Edinburgh*, where the Lords of Council and Session usually sit for Administration of Justice; and in Case of the Absence of the said *Thomas Drummond* of *Logie Almond* and his Forefairs, or their Refusal of the said Sum of 200 *l.* that the same be consigned in the Hands of the Provost, or any one of the Bailies, Dean of Guild, or Treasurer of the City of *Edinburgh*, most responal for the Time, to be made forth coming on the Peril of the Consigner, for the lawful Redemption of the foresaid Lands: And in Case of my Decease without a lawful Child or Children procreate of my Body, the same Lands and Estate aforesaid are and shall be redeemable in the same Manner by the Heirs Male or Female to be procreate of the Body of the said *John Drummond*, Esq; my Brother-German, commonly called Lord *John Drummond*, upon Consignation of the said Sum of 200 *l. Sterling*, and using the foresaid Order of Redemption in Manner above prescribed, and that a Copy hereof, or of the Instrument of Resignation or Infestment to follow hereupon, shall be as valid, effectual and sufficient to all Intents, as if a particular Letter of Reversion was made, subscribed and registered apart."

This Deed contains no Clause, *dispensing with the Delivery*; and although it professes to be made for taking immediate Effect, and to assign to the Appellant the Rents and Profits of the Estate for the Year then current, and in all Time thereafter, the said *James Drummond* retained the total Possession of the Estate till the Day of his Death, and the Appellant never saw, nor attained the Possession of the Deed or Disposition itself.

And

And the Case so standing, the Respondent's Answers or Defences to this Claim were, first, That by the common Law of *Scotland*, it could have no Effect whatsoever, even to exclude *John Drummond*, had he not been attainted, from taking the Estate as Heir or Representative of *James* the Maker of this Deed, because the Deed was never made or compleated by Delivery, nor contains any Clause signifying his *Will* that it should be good or effectual without Delivery.

It was answered secondly, That such Deed, if it had dispensed with the Delivery, could have had no Effect against a Forfeiture for High Treason, but would have been void by the common Rules of Law, being a *Latent* Personal Deed that bears the Marks of fraudulent Device, or, what the Law of *Scotland* terms, *Simulation*, in the whole Structure, and in every Clause of it, from which, and the Circumstances of the said *James Drummond* and his Brother, before and after the Deed was made, it appears manifestly to have been a Device, tho' a very impotent one, which the Law will not suffer to take Effect, that was pursued with Intent to save the Estate from Forfeiture by the Attainder of either of the Brothers, as the Case might happen.

When the Cause came on to be argued before the Court of Session, the Claimant's Council were pleased to open certain new Matter, of which no Notice had been taken in the Claim itself, and which had no direct Tendency to support or maintain the Claim, but only to impugn, or object to the Title or *Medium* upon which the Barons of Exchequer had seized the Lands for the Use of the King, the Allegation being, That *John Drummond*, upon his Failure to render himself to Justice on or before the 12th of *July* 1746, became attainted of High Treason from and after the 18th of *April* preceeding, and therefore, on the 11th of *May*, when *James* his elder Brother died, the said *John* was incapable to take the Estate as his Heir or Successor, or to forfeit the same to the King, but that in Respect of his Attainder, the Lands fell to the Superior, or Over-Lord, as an Escheat, *propter defectum heredis*, from which it was concluded for the Appellant, that the Survey, or Seizure made by the Barons, of these Lands as forfeited to the King by the Attainder of the said *John Drummond*, was erroneous.

To this new Topick the Respondent answered first, that this Claimant had no Title to enter into that Question, as he had no Pretension to be the Superior or Over-Lord of whom the Estate was held by *James Drummond*; that the King himself was that Superior, and so had both the Titles to the Lands, competent to him, namely, that of Forfeiture by the Attainder of *John Drummond*, and that now alledged by the Claimant *propter defectum heredis*; and that by the known Rules of Law, any Party having distinct Titles to an Estate, has his Option which of them he will use whereupon to claim or seize the Possession, and no third Party is intitled to object, or set up one of the Possessor's Grounds of Claim against the other.

It was answered secondly, That the Survey of the Estate as forfeited by *John Drummond*, was proper, because on the 11th of *May* 1746, when the Succession devolved to him by the Death of *James* his elder Brother, he the said *John* was not attainted as well as *James* himself was not, and there was nothing in Law to hinder the said *John* to have entered to the Possession of the Lands, or to have levied the half Year's Rent payable on the 15th of *May* 1746, or even to have compleated the feudal Title to the Lands in his own Person, by procuring himself to be served or retoured Heir to his Brother on the Brief of *Mortancestry*, because his conditional Attainder could not take Place till the Lapse of the 12th Day of *July*, full two Months after the Death of his Brother.

And though in Fact it fell out, That by the Lapse of that Day, joined with his Failure to render himself to Justice, the said *John* became attainted of High-Treason, from and after the 18th of *April* 1746, yet this Retrospect being introduced in Favour of the King, could not be pleaded by any third Party to his Prejudice.

The Court of Session, after hearing the Cause, directed Informations to be given in, thereby to have before them in Writing, the Facts and Arguments mutually alledged; and, upon Consideration of the whole, made their final Decree in the Words following: *Having considered the foresaid Claim entered by Thomas Drummond, of Logie Almond, to the Estate of Drummond, commonly called the Estate of Perth, formerly belonging to James late Lord Drummond, deceased, with the Answers put in thereto by His Majesty's Advocate on Behalf of the Crown, and heard Parties Procurators in their own Presence, FIND, That John Drummond, second Son to the late Lord Drummond, now attainted of High-Treason, was, upon the 11th of May 1746, when James Drummond his elder Brother died, capable to take by Descent from his said elder Brother; and that the Estate of Drummond in Question, did then descend by James's Death to John Drummond now attainted, and was forfeitable, and forfeited, by the Treason and Attainder of the said John Drummond; and that the Trust Disposition to Thomas Drummond of Logie Almond now claimed upon, is not sufficient to exclude the Forfeiture of the said John Drummond, and therefore FIND the Estate acclaimed, forfeited by his Attainder; DISMISS the Claim, and DECERN accordingly.*

Against this Decree the Claimant has now brought his Appeal to your Lordships; but the Respondent humbly hopes that the Decree shall be affirmed, and the Appeal dismissed with Costs, for the following among other

R E A S O N S.

That the Deed of Disposition under which the Appellant claims was void and ineffectual for Want of Delivery, by the known clear Law of *Scotland*.

That the said Disposition was moreover ineffectual to evict the Estate in Question from the Crown, for that it appears from the Structure of the Deed itself, the known Circumstances of the Grantor, and of his Brother and presumptive Heir, the total Possession of the Estate being retained by *James Drummond*, and the Disposition itself also retained in his Power, being deposited in the Hands of his ordinary Lawyer and Confident in his Affairs, that it was no other than a fraudulent Device, pursued with Intent to evade the Forfeiture of the Estate, by the High Treason of either of the two Brothers, as the Case might fall out.

For that the Objection founded upon the Retrospect in the Act of Parliament of *John's* Attainder to the 18th of *April* 1746, is both unwarranted, as is apprehended, in Point of Law, and totally immaterial to the Appellant's Claim, which must depend on its own Strength; nor even would that Retrospect prevent the Crown's Title, since not only the Appellant does not pretend to be the Over-Lord, but the Crown itself is the Over-Lord, and if there was any Escheat by the Attainder of *James Drummond's* Heir, it must be to the Crown and not to the Claimant.

For these and other Reasons, the Respondent humbly hopes the Decree complained of shall be affirmed, and the Appeal dismissed with Costs.

D. RYDER.

WILLIAM GRANT.

W. MURRAY.

30^o. Aprilis 1751.

After Hearing Council as well yesterday as this Day in this Cause, the Judges were directed to give their Opinion on the following Question viz^t. Whether by the Law of England John Drummond Second Son of the late Lord Drummond was on the 11th Day of May 1746 capable of taking Lands by Descent, and whether by his not rendering himself to Justice on or before the 12th of July according to the Act of the 19th Year of His present Majesty, such Descent became Divested or avoided so as to prevent the Forfeiture in prejudice of the Crown? And the Lord Chief Baron of the Court of Excheq^r. having conferred with the Judges present, acquainted the House, that were unanimously of Opinion, that the said John Drummond was capable at that time taking Lands by Descent, and that by his not rendering himself to Justice on or before the 12th of July 1746, such Descent did not become Divested or avoided, so as to prevent the Forfeiture in prejudice of the Crown — Whereupon, and upon due Consideration had of what was offered on either side in this Cause, It is Ordered and Adjudged, that the said Appeal be dismissed this House, and that the said Judgment pronounced by the said Lords of Session and the same is hereby affirmed. /

His Majesty's Advocate for
Scotland, on Behalf of Respondent,
his Majesty, - - -

The Respondent's CASE.

To be heard at the Bar of the House of Lords,
on Monday the 29th Day of April 1751.